

**APPLICATION SUBMITTED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS  
TO THE INTER-AMERICAN COURT OF HUMAN RIGHTS AGAINST THE STATE OF CHILE**

CASE 12.108  
CLAUDE REYES *ET AL.*  
(MARCEL CLAUDE REYES, SEBASTIÁN COX URREJOLA,  
AND ARTURO LONGTON GUERRERO VS. CHILE)

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**I. INTRODUCTION**

1. The Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission”, “the Commission” or the “IACHR”) hereby submits to the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”) an application in the case 12.108, Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero (hereinafter “the victims”) against the State of Chile (hereinafter “the State”, “Chile” or “the Chilean State”), for the denial of access to public information and for failure to provide an adequate remedy to challenge that denial.

2. The Inter-American Commission requests the Court to establish the international responsibility of the State of Chile, which has failed to fulfill its international obligations and has thereby violated Articles 13 (Freedom of Thought and Expression) and 25 (Right to Judicial Protection) in relation to the overall obligations enshrined in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the American Convention on Human Rights

(hereinafter "the Convention" or "the American Convention") to the detriment of Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero.

3. The present case has been dealt with as provided by the American Convention, and is being submitted to the Court pursuant to Article 33 of the Rules of Procedure of the Court. Attached to this application, as an annex, is a copy of Report 31/05 prepared pursuant to Article 50 of the Convention.<sup>1</sup> The Commission adopted that report on March 7, 2005 and sent it to the State on April 8, 2005, giving it two months to present information regarding adoption of the recommendations contained therein.

4. On June 8, 2005, the State requested additional time to present information on its compliance with the recommendations formulated in Report 74/04. The Commission granted an extension of 15 days, until June 23, 2005. On June 30, 2005, the Commission received the State's response. On July 1, 2005, deeming that the State had not adopted its recommendations in a satisfactory manner, and acting pursuant to Articles 51.1 of the Convention and 44 of the Rules of Procedure of the IACHR, the Commission decided to submit this case to the jurisdiction of the Inter-American Court.

## **II. OBJECT OF THE APPLICATION**

5. The purpose of this application is to request the Court to conclude and declare that:

- a. Article 13 of the American Convention, insofar as it guarantees the freedom to "seek, receive and impart information and ideas of all kinds", places a positive obligation upon the State to make information under its control available to the public. This obligation is subject to minimal exceptions, which must be provided for by law and necessary to ensure respect for the rights or reputations of others or the protection of national security, public order, or public health or morals.
- b. The Chilean State violated the right of Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero to access to public information under Article 13 of the American Convention because it refused to provide them with the requested information without providing a valid justification under Chilean law.
- c. The Chilean State violated the victims' right to judicial protection, provided in Article 25 of the American Convention, because it did not provide an effective judicial remedy to address a violation of the right to access to information, a right protected under the Convention.
- d. The Chilean State violated its general human rights obligations under Articles 1(1) and 2 of the Convention because the State did not ensure the victims' rights to access to information and to judicial protection and did not have legal mechanisms in place to guarantee the right to access to public information.

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<sup>1</sup> See Appendix 1, Report 31/05, Case 12.108, Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero, Merits, Chile, March 7, 2005.

6. Consequently, the Inter-American Commission requests the Court to order the State:

- a. To make public the information requested by Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero in the terms stated in paragraph 98 of this application.
- b. To make adequate reparations to Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero for the violations of their rights, including providing them with the requested information.
- c. To provide guarantees that such violations will not be repeated, by bringing its domestic legal order into conformity with Article 13 of the American Convention with respect to access to information and adopting the necessary measures for the creation of practices and a mechanism that will guarantee individuals effective access to public information or information that is in the collective interest.

To pay the costs and legal expenses incurred by the victims in proceedings under the domestic jurisdiction, as well as those originating from proceedings before the inter-American system.

### **III. REPRESENTATION**

7. Pursuant to Articles 22 and 33 of the Rules of Procedure of the Court, the Commission has appointed Evelio Fernández Arévalos, Commissioner, Santiago A. Canton, Executive Secretary, and Eduardo A. Bertoni, Special Rapporteur for Freedom of Expression, as its representatives in this case. Ariel Dulitzky, Víctor H. Madrigal-Borloz, Christina M. Cerna, and Lisa Yagel, specialists with the Executive Secretariat of the IACHR, have been appointed to serve as legal advisers.

### **IV. JURISDICTION OF THE COURT**

8. The Court is competent to hear this case. The Chilean State ratified the American Convention and accepted the contentious jurisdiction of the Court on August 21, 1990. Pursuant to Article 62.3 of the Convention, the Inter-American Court is competent to hear any case submitted to it that relates to the interpretation and enforcement of the provisions of the Convention, provided the States Parties to the case have recognized the competence of the Court.

### **V. PROCEEDINGS BEFORE THE INTER-AMERICAN COMMISSION**

9. On December 17, 1998, a group consisting of "ONG FORJA," "*Fundación Terram*," the "*Clínica Jurídica de Interés Público*" of Diego Portales University, and "Corporación la Morada" (Chilean organizations); the Institute of Legal Defense of Peru (Peruvian organization); "*Fundación Poder Ciudadano*" and the Association for Civil Rights

(Argentinean organizations); and Chilean legislative representatives (*Diputados*) Baldo Prokurica Prokurica, Osvaldo Palma Flores, Guido Girardi Lavín and Leopoldo Sánchez Grunert (hereinafter "the petitioners") submitted a petition to the Commission. On February 24, 1999, the Commission opened the case as case N° 12.108, and sent the pertinent portions of the petition to the State, granting it 90 days to submit its observations.

10. On May 25, 1999, the State requested a 60-day extension, to enable it to obtain the data necessary to comply with the Commission's request. On June 1, 1999 the petitioners requested information about the status of the case. The Commission replied on June 11, informing the petitioners that the petition had been sent to the State, and that they would be notified upon receipt of a reply. On June 14, the petitioners inquired whether the State had requested an extension. On July 19, 1999, the State requested a 30-day extension, which was granted by the Commission in a letter sent on July 21.

11. On August 13, 1999, the State submitted its reply, arguing that the petition should be deemed inadmissible. The Commission acknowledged receipt on August 19. On the same date, the Commission sent the pertinent portions of the State's reply to the petitioners, granting them 30 days to submit observations.

12. On September 1, 1999, the Commission informed all parties that it would hold a hearing in the course of the 104<sup>th</sup> period of sessions. The hearing took place on October 4, 1999. During the hearing, Dr. Juan Pablo Olmedo and Dr. Ciro Colombara appeared on behalf of the petitioners. Dr. Alejandro Salinas appeared on behalf of the State of Chile. Both parties presented considerations on the merits of the case.

13. On February 4, 2000, the State submitted a copy of its response to the questionnaire on *Habeas Data* and Access to Information in the power of the State. This questionnaire had been issued to all OAS Member States by the Office of the Special Rapporteur for Freedom of Expression, to gather information for its 2001 Annual Report. The Commission acknowledged receipt on February 22. On the same date, the Commission sent the pertinent portions of the State's submission to the petitioners, granting them 30 days to reply.

14. On February 22, 2000, the petitioners submitted observations on the State submission that had been received on February 4. On March 6, the Commission acknowledged receipt and sent the pertinent portions of the petitioners' submission to the State, granting them 30 days to submit observations.

15. On June 21, 2000, the Commission received the State's reply to the petitioners' submission of February 22. The Commission acknowledged receipt on July 11. On the same date, the Commission sent the pertinent portions of the State's submission to the petitioners, granting them 30 days to submit observations.

16. On August 14, 2000, the petitioners requested a hearing with the Commission in its 108<sup>th</sup> period of sessions, but the Commission replied on September 15 that this would not be possible due to the large number of hearings scheduled during that session.

17. On September 5, 2000, the Commission received the petitioners' response to the State's June 20 submission. On September 26, the Commission acknowledged receipt and transmitted the pertinent sections to the State, granting them 30 days to submit observations.

18. On September 11, 2000, the petitioners submitted various documents in support of their arguments.

19. On October 30, 2000, the State requested an extension of 60 days to submit its answer to the petitioners' September 5 submission. The Commission replied on November 3, granting an extension of 30 days. The Commission informed the petitioners of this extension on the same day.

20. On December 27, 2000, the petitioners requested a hearing during the 110<sup>th</sup> period of sessions, but the Commission replied on February 2, 2001, that this would not be possible due to the large number of audiences scheduled during that session.

21. On January 29, 2001, the State submitted its observations on the petitioners' September 5 submission. On February 5, the Commission acknowledged receipt and transmitted the pertinent sections to the petitioners, granting them 30 days to submit observations.

22. On August 2, 2001, the petitioners submitted a response to the State's January 29 submission. On August 14, the Commission acknowledged receipt and transmitted the pertinent sections to the State, granting it one month to submit its observations.

23. On September 18, 2001, the Commission received a request for an extension from the State. The Commission replied on September 24 that the State should take whatever measures necessary to reply to the August 14 request as soon as possible.

24. On November 14, 2001, the petitioners inquired about the status of the case.

25. On January 16, 2002, the State submitted its reply to the observations of the petitioners from August 2, 2001. On January 28, 2002, the Commission acknowledged receipt and transmitted the pertinent sections to the petitioners.

26. By a communication received on August 6, 2002, the petitioners declined to reply to the State's most recent reply because they had previously responded to all of the State's arguments. On August 8, 2002, the petitioners contacted the Office of the Special Rapporteur for Freedom of Expression, noting that the original petition had been submitted on December 17, 1998, and that Commission had not declared the admissibility of the case.

27. The Commission adopted admissibility report 60/03 on October 10, 2003, during its 118<sup>th</sup> regular session.<sup>2</sup> On November 11, 2003, the Commission transmitted the admissibility report to the parties and made itself available for a friendly settlement on the merits. In addition,

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<sup>2</sup> See Appendix 2, Report No. 60/03, Case 12.108, Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero, Admissibility, Chile, October 10, 2003.

the Commission gave the Petitioners a period of two months within which to submit additional observations on the merits.

28. The Commission received a letter dated June 8, 2004, in which the Petitioners stated that the time period for a friendly settlement had expired and requested that the Commission issue a report on the merits of the case.

29. On November 9, 2004, the Commission transmitted a letter to the State requesting that it present any additional observations on the merits within a period of two months. No further observations were submitted by the State.

30. On February 24, 2005, the Commission received an *amicus curiae* brief presented by the Open Society Justice Initiative; ARTICLE 19, Global Campaign for Freedom of Expression; *Libertad de Información Mexico* (LIMAC); and the *Instituto Prensa y Sociedad* (IPYS). This brief was transmitted to both of the parties on June 17, 2005.

31. On March 7, 2005, during its 122<sup>nd</sup> period of sessions, the Commission considered the positions of both parties and approved Report No. 31/05 on the merits of the case, pursuant to Article 50 of the American Convention. In that report, the Commission concluded that:

70. Based on the facts discussed in previous sections of this report, the State of Chile did not ensure the alleged Victims' right to access to information because a state agency denied access to information without demonstrating that the information in question fell within one of the legitimate exceptions to the general rule of disclosure under Article 13. Moreover, the State did not have legal mechanisms in place to guarantee the right to access to information effectively at the time of the events giving rise to this petition. Its failure to ensure the alleged Victims' right to access to information, as well as its failure to adapt its domestic law to guarantee this right, constituted a violation of the general obligations enshrined in Articles 1 and 2 of the American Convention.

## V. CONCLUSIONS

71. The Commission finds that the Chilean State violated the rights of Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero to access to public information and to judicial protection, provided for in Articles 13 and 25 of the American Convention, respectively, in relation to Articles 1(1) and 2 of the Convention, by denying them access to information in the hands of the Chilean Committee on Foreign Investment and by failing to give them access to the Chilean courts to challenge that denial.<sup>3</sup>

32. In light of the analysis and the conclusions in that report, the Inter-American Commission considered that the Chilean State should adopt the following recommendations:

1. That the State make public the information requested by Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero;

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<sup>3</sup> See Appendix 1, Report 31/05, Case 12.108, Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero, Merits, Chile, March 7, 2005, paras. 70-71.

2. That the State make adequate reparations to Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero for the violations of their rights, including providing them with the requested information;
3. That the State bring its domestic legal order into conformity with Article 13 of the American Convention with respect to access to information and adopt the necessary measures for the creation of practices and a mechanism that will guarantee inhabitants effective access to public information or information that is in the collective interest.<sup>4</sup>

33. On April 8, 2005, the Inter-American Commission proceeded, in accordance with Article 43.2 of its rules of procedure, to transmit the report on the merits to the State, setting a term of two months for the State to report on measures taken to comply with the recommendations in that report. On that same date, pursuant to Article 43.3 of its rules of procedure, the Commission notified the petitioners of the adoption of the report and its transmission to the State and requested their opinion about the submission of the case to the Inter-American Court.

34. On June 3, 2005, the petitioners declared their interest in having the Commission refer the case to the Court.

35. On June 8, 2005, the Chilean State requested an extension in order to inform the Commission of its compliance with the recommendations contained in Report 31/05. The Commission granted an extension for 15 days from the original deadline for the submission of the information, until June 23, 2005. On June 30, 2005, the State submitted its report.

## **VI. CONSIDERATIONS OF FACT**

### **A. The victims**

36. Marcel Claude Reyes, an economist, is the Executive Director of a non-governmental organization called Fundación Terram. Fundación Terram has as its mission to promote the capacity of civil society to respond to public decisions about investments related to the use of natural resources.

37. Sebastián Cox Urrejola, an attorney, is a representative of the nongovernmental organization "ONG FORJA." ONG FORJA's mission is to improve the capacity of individuals and groups to exercise their rights.

38. Arturo Longton Guerrero is a legislative representative (*Diputado de la República*).

### **B. The request for information**

39. The Empresa Forestal Trillium Ltda. (hereinafter "Forestal Trillium") requested permission and obtained the approval of the Committee on Foreign Investment of Chile (*Comité de Inversiones Extranjeras de Chile*) to carry out a deforestation project in an area of the

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<sup>4</sup> Id., para. 72.

country known as "Río C6ndor." The Committee on Foreign Investment is a government agency that has responsibility for evaluating proposals for foreign investment; establishing the terms and conditions for foreign investment contracts; and ensuring the investor's compliance with eligibility requirements for investors, the approved plan for carrying out the project, and with other Chilean norms.

40. Fundaci6n Terram proposed to evaluate the commercial factors of the R6o C6ndor project, measure its impact on the environment, and provide citizen oversight of the government's actions in its development. For this reason, Fundaci6n Terram sent a letter to the Executive Vice President of the Committee on Foreign Investment, Mr. Eduardo Moyano Berr6os on May 6, 1998, requesting access to state-held information regarding the Committee's obligations with respect to Forestal Trillium and the R6o C6ndor project.<sup>5</sup>

41. In the letter, Fundaci6n Terram requested the following information from the Committee:

1. Contracts made between the State of Chile and the Foreign Investor with respect to the R6o C6ndor project, noting the date and the notary's office where these were carried out and providing copies of these documents given that they are public instruments.
2. Identities of the investors in the project, foreigners and/or nationals.
3. Background information that the Committee on Foreign Investment considered, in Chile and abroad, to ensure the seriousness and suitability of the Investor/s and the agreements of said Committee in which they took those precedents as sufficient.
4. Total amount of the authorized investment for the R6o C6ndor project, the means and dates of the transfer of capital and the existence of credits associated with the project.
5. Capital that has actually entered the country as of this date, both actual capital and associated credits.
6. Information that is under the power of the Committee and/or has been demanded from other public or private entities which refers to the control of the obligations that come with titles to foreign investment or the companies in which they participate, and whether the Committee has taken note of any infraction or crime.
7. Information about whether the Executive Vice-President of this Committee has exercised the authority granted by Article 15a of the D.L. 600, by requesting, from all of the services or businesses from the public and private sector, the reports and precedents required for the completion of the goals of the Committee. In the event that he did, put this information at the disposition of this Foundation.<sup>6</sup>

42. According to the State, in its submission to the Commission of August 13, 1999, the Executive Vice-President of the Committee, Mr. Eduardo Moyano Berr6os invited the alleged victims to a meeting on May 19, 1998, in order to discuss the details of the request for information and to exchange information.<sup>7</sup> The meeting was held in the office of the Executive

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<sup>5</sup> See Annex 1.1, original letter dated May 6, 1998.

<sup>6</sup> Id.

<sup>7</sup> See Appendix 3, Case file placed before the IACHR, response by the Government of Chile dated August 13, 1999, p. 5.

Vice-President. Mr. Claude and Deputy Longton attended. During this meeting and by means of a follow-up fax<sup>8</sup> dated May 19, 1998, Mr. Moyano provided the information requested under points 1, 2, 4 and 5 of the original request for information.

43. Fundación Terram sent letters reiterating their request for information from the Committee on June 3 and July 2.<sup>9</sup> The State did not provide the information requested under points 3, 6 and 7 of the original request for information,<sup>10</sup> nor did the State provide a formal denial of this information stating the reason for the denial.

### C. The judicial proceedings

44. On July 27, 1998, Mr. Claude, Mr. Cox and Mr. Longton presented a *recurso de protección* (an ordinary Constitutional remedy to address State violations of certain human rights) before the Santiago Appeals Court.<sup>11</sup> The alleged victims claimed that the State had violated their right to freedom of expression and access to state-held information guaranteed by Article 19, No. 12 of the Chilean Constitution, in relation to Article 5, No. 2 of the Chilean Constitution; Article 13.1 of the American Convention; and Article 19.2 of the International Covenant on Civil and Political Rights. They asked the Court to order the Committee on Foreign Investment to respond to the request for information and make the information available to the victims within a reasonable period of time.

45. In a resolution dated July 29, 1998, the Court of Appeals declared this action inadmissible due to a lack of foundation.<sup>12</sup> In this resolution, the Court noted that the *recurso de protección* has as its objective to "reestablish the rule of law when this has been disrupted by arbitrary or illegal acts or omissions that threaten, perturb, or prevent the exercise of one of the guarantees that are precisely enumerated in Article 20 of the Political Constitution of the Republic." There is no further explanation of the basis for the decision.

46. The victims then presented a *recurso de reposición*, which is an ordinary action under the Civil Procedure Code, to obtain the reversal or modification of a tribunal's decision, before the same Court on July 31, 1998.<sup>13</sup> They asked the Court to overturn its previous

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<sup>8</sup> See Annex 2, Fax from Eduardo Moyano B., Executive Vice President of the Committee on Foreign Investment to Marcel Claude, dated May 19, 1998.

<sup>9</sup> See Annexes 1.2 and 1.3, letters dated June 3, 1998 and July 2, 1998, respectively, reiterating the request for information.

<sup>10</sup> See Appendix 3, Case file placed before the IACHR, response by the Government of Chile dated August 13, 1999, p. 4.

<sup>11</sup> See Annex 3, *Recurso de Protección* presented by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero to the Santiago Appeals Court on July 27, 1998.

<sup>12</sup> See Annex 4, Resolution of the Santiago Appeals Court of July 29, 1998, declaring the *Recurso de Protección* inadmissible.

<sup>13</sup> See Annex 5, *Recurso de Reposición* presented by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero to the Santiago Appeals Court on July 31, 1998.

decision and declare the case admissible. On August 6, 1998, the Court declared the *recurso de reposición* inadmissible.<sup>14</sup>

47. On July 31, 1998, the victims also presented a *recurso de queja* before the Supreme Court.<sup>15</sup> This is an extraordinary remedy to correct grave abuses committed through jurisdictional resolutions. Through this remedy, the victims sought to challenge the decision of the Santiago Appeals Court on the *recurso de protección*, and requested that the Supreme Court repair the abuse that had been committed by the lower court by declaring the case admissible. This application for relief was deemed inadmissible on August 18 because the *Auto Acordado Sobre Tramitación y Fallo de Recurso de Protección*<sup>16</sup> stated that the proper remedy to challenge the resolution was the *recurso de reposición*.<sup>17</sup>

## VII. LEGAL CONSIDERATIONS

### A. Right to Access to Public Information

48. The value of access to information extends to the promotion of the most important goals in the Americas, including transparent and effective democracies, respect for human rights, stable economic markets, and socioeconomic justice. It is widely acknowledged that without public access to state-held information, the political benefits that flow from a climate of free expression cannot be fully realized. Access to information promotes accountability and transparency within the State and enables a robust and informed public debate. In this way, access to information empowers citizens to assume an active role in government, which is a condition for sustaining a healthy democracy. A transparent mechanism that provides access to state-held information is also essential to foster a climate that is respectful of all human rights. Access to state-held information is similarly necessary to prevent future abuses by government officials and also to ensure that effective remedies against such abuses are guaranteed.<sup>18</sup>

49. As a result of the growing awareness in the Americas of the importance of access to public information, the Heads of State and Government of the Americas recognized that the sound administration of public affairs requires effective, transparent, and publicly accountable government institutions during the Third Summit of the Americas. They also

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<sup>14</sup> See Annex 6, Resolution of the Santiago Appeals Court of August 6, 1998, declaring the *Recurso de Reposición* inadmissible.

<sup>15</sup> See Annex 7, *Recurso de Queja* presented by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero to the Supreme Court of Chile on July 31, 1998.

<sup>16</sup> *Auto Acordado Sobre Tramitación y Fallo de Recurso de Protección*, July 21, 1992, modified June 9, 1998. The *auto acordado* is a type of resolution issued by one of the superior tribunals, in this case, the Supreme Court, to regulate procedural matters that are not sufficiently regulated by Chilean legislation.

<sup>17</sup> See Annex 8, Resolution of the Supreme Court of Chile of August 18, 1998, declaring the *Recurso de Queja* inadmissible.

<sup>18</sup> See, IACHR, Case 10.488, Report No. 136/99, El Salvador, Ignacio Ellacuría, December 22, 1999, paras. 222-32 (discussing the importance to society of getting truthful information about human right violations committed by the state in order to establish responsibility, ensure compensation, and prevent future violations).

assigned the highest importance to citizen participation through effective control systems.<sup>19</sup> The OAS General Assembly passed resolutions on access to information in 2003, 2004 and 2005.<sup>20</sup> The General Assembly resolved "to reaffirm that everyone has the right to seek, receive, access and impart information and that access to information is a requisite for the very exercise of democracy."<sup>21</sup> They further resolved "to reiterate that states are obliged to respect and promote respect for everyone's access to public information and to promote the adoption of necessary legislative or other types of provisions to ensure its recognition and effective application."<sup>22</sup> The General Assembly clearly placed access to public information in the context of human rights, particularly the right to freedom of expression, referring to Article 13 of the American Convention, which protects freedom of expression, in the preambles to both resolutions.<sup>23</sup> The General Assembly also directly called upon the Inter-American Commission on Human Rights and its Special Rapporteurship on Freedom of Expression to monitor this issue in the OAS Member States<sup>24</sup> and to support the efforts of the Member States in developing legislation and other mechanisms related to access to public information.<sup>25</sup>

50. In accordance with this recognition of access to public information as an obligation of the states, many of the OAS Member States have made significant strides in developing and implementing legislation guaranteeing access to public information. In the past several years Trinidad and Tobago, Mexico, Panama, Peru, Jamaica, Ecuador, and the Dominican Republic have passed detailed access to information laws. Canada and the United States have had such laws in place for many years. Many other states in the region are engaged in the process of developing such laws. In fact, in 1999, subsequent to the incidents that gave rise to this petition, Chile passed the "Law on Administrative Probity Applicable to the Organs of the Administration of the State," which provides in its Article 11 that "The public function shall be exercised with transparency, in a manner that permits and promotes knowledge of the proceedings, contents, and decisions that are adopted in that exercise. The administrative acts of the organs of the Administration of the State are public, as are the documents that support or directly and essentially complement those acts."<sup>26</sup> The article further states that a request for such information can only be denied for certain enumerated reasons and establishes a procedure to appeal the denial of a request in the courts. This law was not applied in the case at hand, because it was enacted after the events giving rise to the complaint took place.

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<sup>19</sup> See Third Summit of the Americas, Declaration and Plan of Action. Québec, Canada, 20-22 April 2001.

<sup>20</sup> AG/Res. 1932 (XXXIII-0/03); AG/Res. 2057 (XXXIV-0/04); AG/Res. 2121 (XXXV-0/05).

<sup>21</sup> AG/Res. 2057 (XXXIV-0/04), para. 1.

<sup>22</sup> AG/Res. 2057 (XXXIV-0/04), para. 2.

<sup>23</sup> AG/Res. 1932 (XXXIII-0/03), preamble; AG/Res. 2057 (XXXIV-0/04), preamble; AG/Res. 2121 (XXXV-0/05), preamble.

<sup>24</sup> AG/Res. 1932 (XXXIII-0/03), para. 6; AG/Res. 2057 (XXXIV-0/04), para. 7; AG/Res. 2121 (XXXV-0/05), para. 8.

<sup>25</sup> AG/Res. 2057 (XXXIV-0/04), para. 6; AG/Res. 2121 (XXXV-0/05), para. 6.

<sup>26</sup> See Annex 9, Law No. 19.653, On Administrative Probity Applicable to the Organs of the Administration of the State (*Sobre Probidad Administrativa Aplicable de los Organos de la Administración del Estado*).

51. The Commission considers that the right to access to public information is contained in Article 13 of the American Convention.<sup>27</sup> Article 13 states:

1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
  - a. respect for the rights or reputations of others; or
  - b. the protection of national security, public order, or public health or morals.
3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.
4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence.
5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law.

52. Based on the text of Article 13 of the Convention, the Commission has affirmed that:

[T]he right to freedom of expression includes both the right to disseminate and the right to seek and receive ideas and information. Based on this principle, access to information held by the state is a fundamental right of individuals and states have an obligation to guarantee it.<sup>28</sup>

53. The importance of an effective right of access to information has a solid basis in international and comparative human rights law. Although not all countries and international organizations ground the right of access to state-held information in the right to freedom of expression, there is a growing consensus that governments do have positive obligations to provide state-held information to their citizens, since this right is interdependent with other fundamental rights.<sup>29</sup>

<sup>27</sup> See eg, IACHR, *Report on Terrorism and Human Rights*, OAS/Ser.L./V/II.116, Doc. 5 rev. 1 corr. 22 October 2002, (hereinafter "Terrorism Report"), para. 281-88; IACHR, *Annual Report of the Inter-American Commission on Human Rights 2003*, vol. III, OEA/Ser.L/V/II.118, Doc. 70 rev.2, December 29, 2003, p.135.

<sup>28</sup> Terrorism Report, *supra*, para. 281. See also *Annual Report of the Inter-American Commission on Human Rights 2003*, vol. III, OEA/Ser.L/V/II.118, Doc. 70 rev.2, December 29, 2003, p.135.

<sup>29</sup> See, e.g., Eur. Ct. H.R., *Case of Guerra and Others v. Italy*, Judgment of 19 February 1998, Application No. 0014967/89; *Jane Doe v. Board of Commissioners of Police for the Municipality of Toronto* (Canada), 74 O.R. (2d) 225 (Div. Ct.); *Shabalala v. Attorney-General of the Transvaal & Ano.* (South Africa), 1996 (1) S A 725 (CC).

54. The Special Rapporteur on Freedom of Opinion and Expression of the United Nations has stated clearly that the right to access information held by public authorities is protected by Article 19 of the International Covenant on Civil and Political Rights (ICCPR).<sup>30</sup> The protection of this right was found to be derived from the right to freedom of expression provided by the Covenant, which states that this right "shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice (...)."<sup>31</sup> Access to information was also the topic of a joint declaration issued in December 2004 by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur for Freedom of Expression. The three mandates on freedom of expression stated that "The right to access to information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation ... based on the principle of maximum disclosure, establishing a presumption that all information is accessible subject only to a narrow system of exemptions."<sup>32</sup> They also emphasized that "the burden should be on the public authority seeking to deny access to show that the information falls within the scope of the system of exceptions."<sup>33</sup> Finally, they noted that there must be an opportunity to appeal denials of requests for information to an independent tribunal "with full powers to investigate and resolve such complaints."<sup>34</sup>

55. The European Court of Human Rights has held in two recent cases that individuals do have the right to access state-held records, grounding it in Article 8 of the European Convention, which protects the right to private or family life instead of Article 10, which protects the right to freedom of expression.<sup>35</sup>

56. The Inter-American Court has stated that:

A comparison of Article 13 with the relevant provisions of the European Convention (Article 10) and the Covenant (Article 19) indicates clearly that the guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.<sup>36</sup>

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<sup>30</sup> See Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussein, UN doc. E/CN.4/1999/64, 29 January, 1999.

<sup>31</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

<sup>32</sup> International Mechanisms for Promoting Freedom of Expression, Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, available at <http://www.cidh.oas.org/relatoria/showarticle.asp?artID=319&IID=1>

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Eur. Ct. H.R., *Case of Gaskin v. United Kingdom*, Judgment of 7 July 1989, Application No. 000104054/83; *Guerra and Others v. Italy*, *supra*.

<sup>36</sup> IACtHR, Advisory Opinion OC-5/85, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Articles 13 and 29 of the American Convention on Human Rights), November 13, 1985, Ser. A No. 5, [hereinafter *Advisory Opinion OC-5/85*], para. 50.

57. The right to access to information in the control of the government is essential to the free circulation of ideas and it should follow that under the American Convention, protections for the right to access to information should be even more generous than those under the ICCPR or the European Convention. This is particularly true with respect to Article 10 of the European Convention, which states: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." The word "seek" is absent from this formulation of the right to free expression. Article 13 of the American Convention, by contrast, explicitly protects the "freedom to seek, receive and impart information and ideas of all kinds."<sup>37</sup> Given that the freedom to receive information should prevent public authorities from interrupting the flow of information to individuals, the word seek would logically imply an additional right.<sup>38</sup>

58. In this regard, it is useful to consider the rules established under the Vienna Convention on the Law of Treaties for the interpretation of treaties, as well as the rules on interpretation set forth in the American Convention. Article 31 of the Vienna Convention says that the ordinary meaning of the terms must be taken into account in their context. Article 29 of the American Convention, entitled "Restrictions Regarding Interpretation" states:

No provision of this Convention shall be interpreted as:

- a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
- c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
- d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

59. The emphasis on choosing the least restrictive interpretation possible and the dramatic importance of representative democracy in these contextual excerpts both suggest that an interpretation of the word "seek" that protects the right of access to state-held information is appropriate.

60. The Vienna Convention on the Law of Treaties also offers other tools that further support this outcome. Article 31.3.b of the Vienna Convention establishes that "[t]here shall be taken into account, together with the context [...] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." In the

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<sup>37</sup> Emphasis added.

<sup>38</sup> See IACHR, *Annual Report of the Inter-American Commission on Human Rights 2003*, vol. III, OEA/Ser.L/V/II.118, Doc. 70 rev.2, December 29, 2003, p.143.

case of the American Convention on Human Rights, the relevant interpretations in the course of its application are those made by the Inter-American Court and Commission.

61. As previously stated, the Commission has unambiguously interpreted Article 13 to include the right of access to state-held information.<sup>39</sup> The approval by the Inter-American Commission of the Declaration of Principles on Freedom of Expression developed by the Office of the Special Rapporteur for Freedom of Expression affirmed the notion that in order to adequately comply with the obligations set out by the Convention, States must take effective measures to ensure access to state-held information. Principle 4 states that:

Access to information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of the right (...).

62. The Inter-American Court has not explicitly considered the issue of a general right to access to public information, but the Court's jurisprudence supports such an interpretation of Article 13. In its Advisory Opinion of November 13, 1985, the Inter-American Court interpreted the provision of Article 13 of the Convention as containing both an individual and a collective right:

Those subject to the Convention have not only the right and freedom to express their own thoughts, but also the right and freedom to seek, receive, and impart information and ideas of all kinds... the freedom of expression and information requires, on the one hand, that no one be arbitrarily hindered or prevented from expressing his own thoughts, and therefore represents a right of every individual. But it also entails a collective right to receive any information and to have access to the thoughts of others.<sup>40</sup>

63. The Court noted that Article 29(c), quoted above in full, prohibits an interpretation of the Convention that would preclude "other rights or guarantees that are ... derived from representative democracy as a form of government."<sup>41</sup> The Court further noted that Article 29(d) precludes any interpretation of the Convention that would exclude or limit "the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." Article XXVIII of the American Declaration states:

The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.<sup>42</sup>

64. Therefore, the Court concluded that:

The just demands of democracy must consequently guide the interpretation of the Convention and, in particular, the interpretation of those provisions that bear a critical relationship to the preservation and functioning of democratic institutions.<sup>43</sup>

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<sup>39</sup> See eg, Terrorism Report, *supra*, paras. 281-88; IACHR, *Annual Report of the Inter-American Commission on Human Rights 2003*, vol. III, OEA/Ser.L/V/II.118, Doc. 70 rev.2, December 29, 2003, p.135.

<sup>40</sup> Advisory Opinion OC-5/85, *supra*, para. 30.

<sup>41</sup> *Id.*, para 44.

<sup>42</sup> See also, Article 32(2) of the American Convention on Human Rights, which contains the same language.

<sup>43</sup> Advisory Opinion OC 5/85, *supra*, para. 44.

65. The Court continued in this vein, stating that the right of each person to be well-informed is a fundamental prerequisite of a democratic society.

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable a community, when exercising its options, to be sufficiently informed. Consequently it can be said that a society that is not well informed is not a society that is truly free.<sup>44</sup>

66. The Court continued to emphasize the important role of freedom of expression for the consolidation of democracy in later contentious cases.<sup>45</sup> In the case of *La Nación*, the Court particularly emphasized the importance of transparency of governmental activities and the role of freedom of expression in allowing "mechanisms of control" to operate and in permitting citizens to denounce wrongdoing.<sup>46</sup> In the same case, the Court recognized that "democratic control" by civil society requires that restrictions on debate on matters of public interest should be kept to a minimum. The Court further noted that those who influence issues of public interest have voluntarily exposed themselves to a greater degree of scrutiny than has the general public.<sup>47</sup>

67. In the case of *Canese v. Paraguay*, the Court considered the importance of freedom of expression in the context of an electoral campaign. It stated that freedom of expression is "an authentic instrument for the analysis of the political platforms proposed by the various candidates, which permits greater transparency and oversight of future authorities and their administrations."<sup>48</sup>

68. It follows from the Court's extensive recognition of the role that the dissemination of information plays in a democratic society, particularly in enabling civil society to oversee the actions of the government they have entrusted to protect their interests, that Article 13 must encompass a positive obligation on the part of the State to provide access to information in its control. Otherwise, the free debate that is so essential in a democracy would be based on incomplete information.

69. As a result of the foregoing, the Commission considers that the right to access to public information is a right contained in Article 13 of the American Convention and it places a positive obligation on governments to provide such information to civil society. This right is not absolute; however, in accordance with the broad terms of Article 13, the right to access to information must be governed by the "principle of maximum disclosure."<sup>49</sup> In other words, the

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<sup>44</sup> *Id.*, para. 70.

<sup>45</sup> IACtHR, *Case of Ivcher Bronstein vs. Peru*, Judgment of February 6, 2001, Series C No. 74; IACtHR, *Case of Herrera-Ulloa vs. Costa Rica* (hereinafter the "*La Nación Case*"), Judgment of July 2, 2004, Series C No. 107; IACtHR, *Case of Ricardo Canese vs. Paraguay*, Judgment of August 31, 2004, Series C No. 111.

<sup>46</sup> *La Nación Case*, *supra*, paras. 116-17.

<sup>47</sup> *Id.*, paras 127, 129.

<sup>48</sup> *Case of Ricardo Canese vs. Paraguay*, *supra*, para. 88.

<sup>49</sup> *Terrorism Report*, *supra*, para. 284; *Annual Report of the Inter-American Commission on Human Rights 2003*, vol. III, OEA/Ser.L/V/II.118, Doc. 70 rev.2, December 29, 2003, p.144. See also Article XIX, *The Public's Right*

presumption should be that information will be disclosed by the government. Limited restrictions on disclosure, based on the same criteria that allow sanctions to be applied under Article 13, may be included in the law. The burden of proof is on the State to show that limitations on access to information are compatible with the inter-American standards on freedom of expression.<sup>50</sup> As the Commission<sup>51</sup> has previously stated, the restrictions must be expressly defined in the law and necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals. This means that not only must the restriction relate to one of these aims, it must also be shown that the disclosure threatens to cause substantial harm to that aim and that the harm to the aim must be greater than the public interest in having the information. This is essentially the proportionality principle that is applied in any case of restrictions on the right to freedom of expression.

70. In the case at hand, the victims submitted a request for information to a government agency. According to the submissions of the parties to the Commission, the request was never formally granted or denied, although some of the requested information was given to the victims.<sup>52</sup> It is with respect to the information that was not turned over to the victims that the Commission is concerned. The State claims that it could not answer points 3, 6, and 7 of the victims' request for information. These three points had to deal how the Committee on Foreign Investment evaluated a certain foreign investor's suitability to carry out a deforestation project in Chile. The State basically makes two arguments as to why access to information principles did not require it to reveal this information to the alleged Victims.

71. First, the State argues that the information in question should be considered reserved or confidential because of its nature. In particular, the State claims that the type of information requested would have violated, if revealed to the victims, the confidentiality rights of the companies involved. According to the State, due reserve in this type of enterprise is necessary for the protection of constitutionally-guaranteed economic rights and for carrying out Chilean foreign investment policy.

72. Second, the State asserts that the information requested in points 3, 6, and 7 of the May 7 letter, were more of an attempt to exercise an oversight role over the Committee than a respectful request for information. The State indicates that in the Chilean constitutional order, the role of overseeing the actions of government entities belongs exclusively to the Chamber of Deputies; therefore, the Fundación Terram and Deputy Longton have attempted to confer broader powers upon themselves than they actually have.

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to Know: Principles on Access to Information Legislation (June 1999), available in <http://www.article19.org/docimages/1113.htm>, Principle 1. Article XIX is a global non-governmental organization dedicated to promoting freedom of expression and access to official information. Its Freedom of Information Principles have been used widely by international organizations and NGOs. See, e.g. IACHR, Annual Report 1999, vol. III, Report of the Office of the Special Rapporteur for Freedom of Expression, OEA/Ser.L/V/II.111, Doc. 3 rev., vol. III, p.88; Commission on Human Rights resolution 2001/47, U.N. Commission on Human Rights, 57<sup>th</sup> Sess., Supp. No. 3, at 209, E/CN.4/RES/2001/47 (2001), preamble.

<sup>50</sup> Terrorism Report, *supra*, para. 285.

<sup>51</sup> *Id.*, para. 286.

<sup>52</sup> This is verified, in part, by the fax that was submitted as an annex to the State's first submission to the Commission. See Annex 2, Fax from Eduardo Moyano B., Executive Vice President of the Committee on Foreign Investment to Marcel Claude, dated May 19, 1998.

73. With respect to these arguments, the Commission reiterates the interpretation of Article 13 made previously by both the Commission and the Court, which establishes that restrictions on the right to seek, receive, and impart information must be "expressly established by law."<sup>53</sup> The Commission considers that, in the context of access to information, this requires that the law recognize the principle of maximum disclosure of information and that exceptions to this general principle of disclosure be expressly established by law. The State has not cited to any provisions of Chilean law or legal precedents that expressly establish as reserved information regarding the decision-making process of the Committee on Foreign Investment. The decision to withhold the information appeared to be wholly in the discretion of the Vice President of the Committee. The Commission considers that such broad powers of discretion conferred on governmental agencies regarding whether or not to disclose public information make it possible for public officials or agencies to withhold information that may be of great public interest, but that the officials or agencies prefer to maintain confidential for personal or other reasons. This frustrates the nature and purpose of the guarantee of access to information, which is to enable the public to oversee the actions of public officials and agencies to ensure the proper functioning of the government in a democracy. An access to information law should provide clear guidance for public officials, setting forth specific categories of information that are exempt from disclosure.

74. Moreover, the Commission considers that the State has failed to show how the withholding of the information in question was "necessary" to further a legitimate aim under Article 13.<sup>54</sup> As previously indicated, the legitimate aims set forth in Article 13 include: to ensure: respect for the rights or reputations of others; or the protection of national security, public order, or public health or morals. The State has broadly asserted that revealing the bases upon which the Committee made its decisions would affect the confidentially rights of the foreign firms investing in Chile. However, the State did not explain the nature of these rights and how they would be affected. Moreover, it is not clear whether the rights referred to are individual rights or rights of an economic entity, such as a corporation. The Commission

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<sup>53</sup> See, eg., Advisory Opinion OC 5/85, *supra*, para. 39 (setting forth four requirements for the imposition of liability under Article 13, including "the existence of previously established grounds for liability" and "the express and precise definition of these grounds by law"). For a similar interpretation, see also Eur. Court H.R., *Sunday Times v. United Kingdom*, Judgment of April 26, 1979, Ser. A No. 30, para 49.(stating that, in the context subsequent liability for expression, the term "expressly established by law means that the basis for liability is "formulated with sufficient precision to enable the citizen to regulate his conduct."); Eur. Court H.R., *Rekvényi v. Hungary*, Judgment of May 20, 1999, Reports of Judgments and Decisions 1999-III, p 423, para. 34 (stating that the level of precision required depends on the content of the instrument in question, its subject matter, and the number and status of those to whom it is addressed, and finding that a constitutional provision containing vague terms was sufficiently precise when read in conjunction with complementary laws and administrative regulations); Eur. Court H.R., *Hashman and Harrup v. United Kingdom*, Judgment of November 25, 1999, Reports of Judgments and Decisions 1999-VIII, p 1, paras. 29-43 (finding that the interference with freedom of expression was not compatible with Article 10 of the European Convention because the definition of the offense was overly vague and therefore not adequately "prescribed by law").

<sup>54</sup> The Inter-American Court of Human Rights has determined that for a restriction on the right to freedom of expression to be "necessary," it must be more than just "useful," "reasonable", or "desirable." (Advisory Opinion OC 5/85, *supra*, para. 46.) It must be the least restrictive of possible means to achieve the government's compelling interest. (Id.) The penalty "must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees."(Id.) Moreover, the provision "must be so framed so as not to limit the right protected by Article 13 more than is necessary. . . . [T]he restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it."(Id.)

considers that the legitimate aim of ensuring “respect for the rights or reputations of others” refers to the rights of individual persons or groups of persons, not the rights of economic entities.<sup>55</sup> Therefore, the State has not shown how the protection of the confidentiality interests of these firms is linked to one of the legitimate aims set forth in Article 13 for restrictions on the right to freedom of expression. Furthermore, the State did not present any arguments to show that disclosure of the information would cause substantial harm to these aims and that such harm would outweigh the public interest in disclosure of the information. On the other hand, it is clear to the Commission that there is a substantial public interest in the disclosure of the information requested because it relates to a deforestation project that could be damaging to the environment and impede sustainable development in Chile if the company carrying out the project does not follow appropriate standards. Additionally, there is a significant public interest in enabling individual members of civil society to monitor the actions of governmental entities. Thus, the Commission considers that the State has not proven that withholding the information was necessary to fulfill a legitimate aim under Article 13, or that the State's interest in withholding the information outweighs the public interest in its disclosure, as required by Article 13.

75. Additionally, the State's assertion that the role of oversight of government agencies belongs solely to the legislature is clearly untenable. In fact, as discussed above and asserted repeatedly by the Commission and by the Inter-American Court, the primary purpose of the right to freedom of expression is to allow civil society to exercise its role of oversight of the government, a role that is inherent in the democratic system of government.

76. In the State's response to the Commission regarding compliance with the recommendations set forth in the merits report,<sup>56</sup> the Chilean State essentially argues that all of these points are now moot because the Rio Condor project was never implemented. Therefore, the State asserts, there is no longer a public or collective interest in releasing the information requested by the victims. The Commission disagrees with the State's assessment because the information requested by the victims was relevant to evaluate the functioning of the Committee on Foreign Investment, not just to evaluate the particular project under consideration. It is up to the victims, not the State, to decide whether the information is still of interest to them.

77. The State further asserts that it is analyzing the possibility of some form of “symbolic reparation” for the victims, which it will propose to the Commission at some later date. However, the State has not provided any specific details about when they would inform the Commission about the type of “symbolic reparations” it would offer the victims, nor has it provided any information regarding the nature of such reparations. In light of the vagueness of this proposal, the Commission does not find it sufficient to delay the initiation of proceedings before the Inter-American Court.

78. For the foregoing reasons, the Commission asks the Court to rule that the State has violated the victims' right to access to information, as protected under Article 13 of the American Convention, and that it has not repaired that violation.

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<sup>55</sup> See Article 1.2 of the American Convention.

<sup>56</sup> See Appendix 3, Case file placed before the IACHR, Communication from the Government of Chile dated June 29, 2005.

## B. The Right to Judicial Protection

79. The right to judicial protection is provided for in Article 25 of the American Convention, which states:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b. to develop the possibilities of judicial remedy; and

c. to ensure that the competent authorities shall enforce such remedies when granted.

80. The Inter-American Court has stated that the primary purpose of international human rights law is to protect individuals from the arbitrary exercise of power by the state. As such, "the inexistence of effective domestic remedies places the victim in a state of defenselessness."<sup>57</sup> For this reason, the lack of an effective judicial remedy to address violations of rights protected by the Convention constitutes a separate violation of the Convention.<sup>58</sup> Moreover, as the Court has frequently stated, the guarantee of an effective judicial remedy is not only a basic pillar of the American Convention, "but also of the rule of law itself in a democratic society, in the terms of the Convention."<sup>59</sup>

81. An "effective" judicial remedy is one that is capable of producing the result for which it was designed.<sup>60</sup> A judicial remedy need not be resolved in favor of the party alleging a violation of his or her rights in order to be considered "effective;" however, effectiveness implies that the judicial body has entered into an evaluation of the merits of the claim.<sup>61</sup> The Commission has found, in a case in which the judicial tribunal determined that it did not have legal jurisdiction to evaluate an alleged violation of rights, that:

Article 25(2)(a) expressly establishes the right of any person claiming judicial remedy to "have his rights *determined* by the competent authority provided by the legal system of the state." [footnote omitted] *To determine* the rights involves making a determination of the facts and the alleged right --with legal force-- that will bear on and deal with a specific object. This object is the claimant's specific claim. When in this case the judicial tribunal

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<sup>57</sup>IACtHR, Constitutional Court Case (Aguirre Roca, Rey Terry, and Revoredo Marsano vs. Peru), Series C No. 71, Judgment of January 31, 2001, para. 89.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*, para. 90 (footnote omitted).

<sup>60</sup> See IACt.HR, Velasquez Rodriguez Case (Honduras), Series C No. 4, Judgment of July 29, 1988, para. 66.

<sup>61</sup> IACHR, Report No. 30/97, Case 10.087, Gustavo Caranza (Argentina), September 30, 1997, para. 74.

denied the claim and declared the matters interposed to be "non-justiciable" because "there is no legal jurisdiction with regard to the matters set forth and it is not appropriate to *decide* thereon," it avoided a determination of the petitioner's rights and analyzing his claim's soundness, and as a result prevented him from enjoying the right to a judicial remedy under the terms of Article 25.<sup>62</sup>

82. A similar situation arises in the instant case. The Santiago Court of Appeals rejected the victims' *recurso de protección* because it "lacked foundation," as it did not allege a violation of a right enumerated in Article 20 of the Constitution. In other words, the Court did not have jurisdiction to evaluate the claim. The Court of Appeals also rejected the *recurso de reposición* without evaluating the merits of the claim. Finally, the Supreme Court rejected the *recurso de queja* on procedural grounds, noting that the *recurso de reposición* was the proper remedy to challenge a decision on a *recurso de protección*. The Chilean courts never entered into even a cursory determination of the victims' rights. Given that the right to access to information is a fundamental right protected under Article 13 of the American Convention, the State has an obligation to provide an effective judicial remedy for alleged violations of that right, in accordance with the terms of Article 25 of the Convention, quoted above. The State did not provide such a remedy to the alleged Victims in this case.

83. Based on the foregoing, the Commission asks the Court to find that the State violated the victims' right to a judicial remedy under Article 25.

### **C. General Obligations to Respect and Ensure Human Rights**

84. Article 1(1) of the American Convention establishes that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

85. While Article 2 of the Convention establishes that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

86. With respect to these requirements, the Court has stated:

[T]he general obligations of the State, established in Article 2 of the Convention, include the adoption of measures to suppress laws and practices of any kind that imply a violation of the guarantees established in the Convention, and also the adoption of laws and the implementation of practices leading to the effective observance of the said guarantees.<sup>63</sup>

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<sup>62</sup> Id. para. 77 (emphasis in original).

<sup>63</sup> IACtHR, *Last Temptation of Christ* (Olmedo Bustos et al) Case, Series C No. 73, Judgment of February 5, 2001, para 85.

87. The Court continued:

In international law, customary law establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence. The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights that it embodies. This general obligation of the State Party implies that the measures of domestic law must be effective (the principle of *effet utile*). This means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires. Such measures are only effective when the State adjusts its actions to the Convention's rules on protection.<sup>64</sup>

88. As noted previously in this application, the State of Chile did not have measures in force under its domestic law that would guarantee the effective observance of the right to access to information. The Commission notes that after the time that the events alleged in this petition occurred, the State passed the Law on Administrative Probity,<sup>65</sup> which amended Law 18.575, *Orgánica Constitucional de Bases Generales de la Administración del Estado*. The amended law provides that “administrative acts of the organs of the Administration of the State, as well as the documents that support or directly and essentially complement them, are public.” Individuals have the right to request such information from the head of the agency responsible for the act in question. The agency can deny access to the requested information under the following circumstances:

1. If the information is classified as “reserved” or “secret” under other laws or regulations;
2. If publicizing the information impedes the proper functioning of the agency from which the information is requested;
3. If a third party who is referred to or affected by the information duly objects;
4. If the information requested affects the rights or interests of third persons, according to the well-founded judgment of the head of the agency from which the information is requested;
5. If the publication of the information affects national security or the national interest.

89. The Commission considers that while this new law shows the Chilean State's interest in improving access to state-held information in Chile, it is insufficient to guarantee full respect for the right to access to information and to ensure that violations such as that which occurred in the present case are not repeated. First, the law only applies to “administrative acts” and supporting documents, which “excludes a vast quantity of records and other

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<sup>64</sup> Id. para 87.

<sup>65</sup> See Annex 9, Law No. 19.653, On Administrative Probity Applicable to the Organs of the Administration of the State (*Sobre Probidad Administrativa Aplicable de los Organos de la Administración del Estado*).

information in the possession of the State that do not constitute ‘administrative acts’ or may not be related to final or contentious administrative decision-making.”<sup>66</sup>

90. Second, the exemptions provided for in the law are overly broad, vague, and confer an excessive degree of discretion on the official determining whether or not to disclose the information. As the Commission has previously argued, restrictions on the right to access to information must be expressly defined in the law and necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals. This means that not only must the restriction relate to one of these aims, it must also be shown that the disclosure threatens to cause substantial harm to that aim and that the harm to the aim must be greater than the public interest in having the information. This is essentially the proportionality principle that is applied in any case of restrictions on the right to freedom of expression.<sup>67</sup> In the Chilean law, the third exemption, for example, allows a third party who is referred to or “affected” by the information to prevent disclosure of the information, without a showing that his or her interest in keeping the information private outweighs the public interest in having access to the information. Likewise, the fifth exemption does not balance the national security or other national interest against the public interest in access to information, and furthermore, does not define the terms “national security” or “national interest.” The other exemptions are similarly flawed.

91. Based on the foregoing, the Commission argues that the State of Chile did not ensure the victims' right to access to information because a state agency denied access to information without demonstrating that the information in question fell within one of the legitimate exceptions to the general rule of disclosure under Article 13. Moreover, the State did not have legal mechanisms in place to guarantee the right to access to information effectively at the time of the events giving rise to this petition. Finally, the Commission argues that the current state of Chilean law also fails to guarantee the effective observance of the right to access to information. The Commission therefore asks the Court to find that the State has violated the general obligations enshrined in Articles 1.1 and 2 of the American Convention.

## VIII. REPARATIONS AND COSTS

92. By reason of the facts argued in this complaint, and the consistent jurisprudence of the Inter-American Court, which establishes that “it is a principle of International Law that all violations to an international obligation that have caused harm generate an obligation to adequately redress that harm [...]”,<sup>68</sup> the Commission submits to the Court its position on the

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<sup>66</sup> See Appendix 3, Case file placed before the IACHR, *Amicus curiae* brief presented to the Commission by the Open Society Justice Initiative; ARTICLE 19, Global Campaign for Freedom of Expression; *Libertad de Información Mexico* (LIMAC); and the *Instituto Prensa y Sociedad* (IPYS), February 24, 2005.

<sup>67</sup> See supra, note 54 and accompanying text.

<sup>68</sup> IACtHR, Case of the Gómez Paquiyaui Brothers vs. Peru, Judgment of July 8, 2004, Series C No. 10, para. 187; IACtHR, Case of Myrna Mack Chang vs. Guatemala, Judgment of November 25, 2003, Series C No. 101; para. 141; IACtHR, case of Bulacio vs. Argentina, Judgment of September 18, 2003, Series C No. 100, para. 72; IACtHR, Case of Juan Humberto Sánchez vs. Honduras, Judgment of June 7, 2003, Series C No. 99, para 147.

reparations and costs that the Chilean State must bear as a result of its responsibility for the violations committed against Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero.

93. In light of the Rules of Procedure of the Court, which grant autonomous representation to the individual, the Commission will merely outline below the general criteria relating to reparations and costs that it believes should be applied by the Court in this case. The Commission understands that it is up to the victims and their representative to substantiate their claims, pursuant to Article 63 of the American Convention and Articles 23 and others of the Court's rules of procedure. If the victims decline to avail themselves of this right, the Commission asks the Court to grant it an opportunity to quantify the appropriate claims.

#### **A. Obligation of reparation**

94. Article 63.1 of the American Convention establishes that:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

95. This provision recognizes a customary standard "that constitutes one of the fundamental principles of contemporary international law on the responsibility of States".<sup>69</sup> Reparation for damages occasioned by the violation of an international obligation requires, wherever possible, full restitution, which means reestablishing the situation prior to the violation. If this is not possible, the Court may order measures to guarantee respect for the rights violated and to repair the consequences that those violations produced, by awarding payment of indemnity in compensation for the damages caused.<sup>70</sup> Reparations also have the additional and no less important objective of avoiding and restraining future violations.

#### **B. Reparation measures**

96. The Court has ruled that reparation measures are intended to banish the effects of the violations committed.<sup>71</sup> Those measures cover the various means by which a State may fulfill its international responsibility. Under international law those means consist of measures of restitution, compensation, rehabilitation, satisfaction and guarantees of no repetition.<sup>72</sup> In the

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<sup>69</sup> IACtHR, Case of Carpio Nicolle et al. vs. Guatemala, Judgment November 22, 2004, Series C No. 117, para. 86; IACtHR, Case of the Plan de Sánchez Massacre vs. Guatemala, Judgment of November 19, 2004, Series C No. 116, para. 52; IACtHR, Case of De la Cruz Flores vs. Peru, Judgment of November 18, 2004, Series C No. 115, para. 139.

<sup>70</sup> Case of the Gómez Paquiyauri Brothers, *supra*, para. 189; IACtHR, Case of 19 Merchants vs. Colombia, Judgment of July 5, 2004, Series C No.109, para. 221; IACtHR, Case of Molina Theissen vs. Guatemala, Reparations, Judgment of July 3, 2004, Series C No. 108, para 42.

<sup>71</sup> Case of Carpio Nicolle et al., *supra*, para. 89; Case of De la Cruz Flores, *supra*, para. 141; Case of the Gómez Paquiyauri Brothers, *supra*, para. 190.

instant case, the Commission considers that reparation can be achieved through satisfaction and guarantees of no repetition.

97. "Satisfaction" is understood as any measure that the perpetrator of a violation must take in accordance with international instruments or with customary law for the purpose of recognizing that an unlawful act has been committed.<sup>73</sup> Satisfaction may be obtained through three, generally cumulative, steps: an apology, or some other gesture recognizing liability for the act in question; trial and punishment of those responsible; and measures to avoid repetition of the damage.<sup>74</sup>

98. In order to repair the effects of the violation of the victims' right to access to information under Article 13 and provide the victims with satisfaction, the State should acknowledge that it wrongly withheld information from the victims and immediately give them access to the information they sought from the Committee on Foreign Investment and ensure that the said information will be made available to any other individual who requests it. The Commission therefore requests the Court to order the State to take such steps, despite the State's assertion that the requested information is no longer relevant.<sup>75</sup>

99. Regarding guarantees that such violations will not be repeated, the Commission requests the Court to order the State to adopt laws and practices that will guarantee effective access to information held by government bodies in accordance with the terms of Article 13 of the Convention. As the Commission has noted previously in this report, the State passed a law in 1999 that provides for public access to some documents in the possession of state agencies. However, the Commission considers that the Chilean legislation currently in effect does not sufficiently guarantee access to state-held information.<sup>76</sup> Therefore, the Commission still considers it necessary to ask the Court to order the State to adapt its laws regarding access to information.

### **C. Costs and expenses**

100. The Court has consistently maintained that costs and expenses must be understood as part of the concept of reparations contained in Article 63.1 of the American Convention, recognizing that the efforts of the injured parties, their heirs or their representatives in seeking international justice imply financial outlays and commitments that must be compensated.<sup>77</sup> Additionally, the Court has ruled that the costs referred to in Article 55.1.h of its

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<sup>72</sup> See United Nations, *Final report presented by Theo Van Boven*, Special Rapporteur of the United Nations Sub-Commission on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, E/CN.4/Sub2/1990/10, 26 July 1990. See also IACtHR, Case of Blake vs. Guatemala, Reparations, Judgment of January 22, 1999, Series C No. 48, para. 31; IACtHR, Case of Suárez Rosero vs. Ecuador, Reparations, Judgment of January 20, 1999, Series C No. 44, para. 41; and IACtHR, Case of Castillo Páez vs. Peru, Reparations, Judgment of November 27, 1998, Series C No. 43.

<sup>73</sup> Ian Brownlie, *State Responsibility, Part 1*, Clarendon Press, Oxford, 1983, page 208.

<sup>74</sup> *Id.*

<sup>75</sup> See discussion *supra*, para. 76.

<sup>76</sup> See discussion *supra*, paras. 88-91

rules of procedure include necessary and reasonable expenses of access to the oversight bodies for the American Convention, and that these expenses include fees for legal assistance. The Inter-American Commission requests that, once it has heard the representatives of the victims, the Court order the Chilean State to pay their duly substantiated costs and expenses.

## **IX. CONCLUSIONS**

101. On the basis of the arguments presented in this complaint, the Commission asks the Court to declare that the Chilean State violated, to the detriment of Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero, the rights protected in Articles 13 and 25 of the American Convention, in relation with Articles 1.1 and 2.

## **X. PETITION**

102. The Inter-American Court requests the Court to declare that:

- a. Article 13 of the American Convention, insofar as it guarantees the freedom to “seek, receive and impart information and ideas of all kinds”, places a positive obligation upon the State to make information under its control available to the public. This obligation is subject to minimal exceptions, which must be provided for by law and necessary to ensure respect for the rights or reputations of others or the protection of national security, public order, or public health or morals.
- b. The Chilean State violated the right of Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero to access to public information under Article 13 of the American Convention because it refused to provide them with the requested information without providing a valid justification under Chilean law.
- c. The Chilean State violated the victims’ right to judicial protection, provided in Article 25 of the American Convention, because it did not provide an effective judicial remedy to address a violation of the right to access to information, a right protected under the Convention.
- d. The Chilean State violated its general human rights obligations under Articles 1(1) and 2 of the Convention because the State did not ensure the victims’ rights to access to information and to judicial protection and did not have legal mechanisms in place to guarantee the right to access to public information.

103. In light of the arguments of fact and law and of the preceding conclusions, the IACHR requests that the Court order the Chilean State:

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<sup>77</sup> Case of Carpio Nicolle et al., *supra*, para. 143; Case of the Plan de Sánchez Massacre, *supra*, para. 115; Case of De la Cruz Flores, *supra*, para. 177.

- a. To make public the information requested by Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero in the terms stated in paragraph 98 of this application.
- b. To make adequate reparations to Marcel Claude Reyes, Sebastián Cox Urrejola, and Arturo Longton Guerrero for the violations of their rights, including providing them with the requested information.
- c. To provide guarantees that such violations will not be repeated, by bringing its domestic legal order into conformity with Article 13 of the American Convention with respect to access to information and adopting the necessary measures for the creation of practices and a mechanism that will guarantee individuals effective access to public information or information that is in the collective interest.
- d. To pay the costs and legal expenses incurred by the victims in proceedings under the domestic jurisdiction, as well as those originating from proceedings before the inter-American system.

## **XI. EVIDENCE SUBMITTED**

### **A. Documentary Evidence**

104. To substantiate the arguments of fact and law set forth in this application, the Commission attaches the documentary evidence listed below:

**Appendix 1.** Report 31/05, Case 12.108, Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero, Merits, Chile, March 7, 2005.

**Appendix 2.** Report No. 60/03, Case 12.108, Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero, Admissibility, Chile, October 10, 2003.

**Appendix 3.** Case file placed before the IACHR.

**Annex 1.** Letters requesting information from the Committee on Foreign Investment.

**Annex 1.1.** Original letter dated May 6, 1998.

**Annex 1.2.** Letter dated June 3, 1998 reiterating the request for information.

**Annex 1.3.** Letter dated July 2, 1998 reiterating the request for information.

**Annex 2.** Fax from Eduardo Moyano B., Executive Vice President of the Committee on Foreign Investment to Marcel Claude, dated May 19, 1998.

**Annex 3.** *Recurso de Protección* presented by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero to the Santiago Appeals Court on July 27, 1998.

**Annex 4.** Resolution of the Santiago Appeals Court of July 29, 1998, declaring the *Recurso de Protección* inadmissible.

**Annex 5.** *Recurso de Reposición* presented by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero to the Santiago Appeals Court on July 31, 1998.

**Annex 6.** Resolution of the Santiago Appeals Court of August 6, 1998, declaring the *Recurso de Reposición* inadmissible.

**Annex 7.** *Recurso de Queja* presented by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero to the Supreme Court of Chile on July 31, 1998.

**Annex 8.** Resolution of the Supreme Court of Chile of August 18, 1998, declaring the *Recurso de Queja* inadmissible.

**Annex 9.** Law No. 19.653, On Administrative Probity Applicable to the Organs of the Administration of the State (*Sobre Probidad Administrativa Aplicable de los Organos de la Administración del Estado*).

**Annex 10.** Powers of Attorney granted by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero to Juan Pablo Olmedo Bustos.

**Annex 11.** Personal data on the expert offered by the Commission.

## **B. Testimony from witnesses and experts**

### **1. Witnesses**

105. The Commission presents the following witnesses:

1. Marcel Claude Reyes, Executive Director of Fundación Terram. The Commission presents this witness to the Court to give testimony regarding the experiences of citizens and citizen groups in seeking access to information of public interest from the government of Chile. Correspondence may be sent to him at the address of his representative, listed below.

2. Sebastián Cox Urrejola, attorney, ONG FORJA. The Commission presents this witness to the Court to give testimony regarding the experiences of citizens and citizen groups in seeking access to information of public interest from the government of Chile. Correspondence may be sent to him at the address of his representative, listed below.

3. Arturo Longton Guerrero, legislative representative (*Diputado de la República*). The Commission presents this witness to the Court to give testimony regarding the experiences of citizen groups and legislative representatives in seeking access to information of public interest from the government of Chile. Correspondence may be sent to him at the address of his representative, listed below.

### **2. Experts**

106. The Commission presents Ernesto Villanueva, Researcher and Coordinator of the Access to Information Program of the Institute for Juridical Research (*Instituto de Investigaciones Jurídicas*) of the *Universidad Nacional Autónoma de México*. The Commission presents him to provide information about the role of access to information in a democracy, and to present a comparative perspective as to how some other countries, including Mexico, have been resolving the issue. Correspondence may be addressed to him at Instituto de Investigaciones Jurídicas s/n, Circuito Mtro. Mario de la Cueva, Ciudad Universitaria, 04510, México, D.F.

## **XII. DATA ON THE PETITIONERS AND VICTIMS**

107. In accordance with Article 33 of the Court's Rules of Procedure, the Commission advises the Court that Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero have granted powers of attorney to Juan Pablo Olmedo Bustos, attorney, who will act during these proceedings as their representative.<sup>78</sup> Notification may be sent to them at: Calle Juan Antonio Ríos No. 58 Piso 6, Santiago, Chile; fax 56-2-6388483; email [jpolmedo@cyo.cl](mailto:jpolmedo@cyo.cl).

Washington, D.C.  
8 July 2005

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<sup>78</sup> See Annex 13, Powers of Attorney granted by Marcel Claude Reyes, Sebastián Cox Urrejola and Arturo Longton Guerrero to Juan Pablo Olmedo Bustos.